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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 163.

ARTHUR H. LAMBORN, GERARD P. TAMELING, CHARLES C. RIGGS, HENRY B. HUTCHINGS, CLARENCE G. TROUP, KARL E. LINDGREN, GEORGE H. LOGAN, N. NELSON KEEN and B. WHEELER DYER,, surviving partners of the copartnership of Lamborn & Company, *Petitioners* (Plaintiffs Below),

against

THE NATIONAL BANK OF COMMERCE OF NORFOLK, VIRGINIA, a National Banking Association or Corporation, created by and under the Acts of Congress of the United States, *Respondent* (Defendant Below).

BRIEF SUBMITTED ON BEHALF OF RESPONDENT.

TAZEWELL TAYLOR,
Counsel for the National Bank of Commerce of Norfolk, Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF SUBMITTED ON BEHALF OF RESPONDENT.

I. INTRODUCTION.

Lamborn and Company, the Petitioners herein, as plaintiffs, instituted an action at law against The Na-

tional Bank of Commerce of Norfolk, the Respondent, as defendant, in the United States District Court, Eastern District of Virginia, at Norfolk, and upon the trial of the same and after all the evidence in the case had been submitted to the jury, upon motion of the plaintiffs the trial court directed the jury to render a verdict in favor of the plaintiffs in the sum of $48,009.81, with interest thereon at the rate of six per cent per annum from January 7, 1921, until paid, for which amount, after allowing a credit of $7,019.13, as of, and with interest thereon at the rate of six per cent from October 28, 1921, a judgment was rendered by the Court, together with costs. (R. 6-7)

To this judgment a writ of error was awarded by the Circuit Court of Appeals for the Fourth Circuit and, upon hearing in that Court on appeal, the judgment of the United States District Court was reversed, and a new trial awarded on October 22, 1924 (R. 86). The opinion of the Circuit Court of Appeals, rendered October 21, 1924, is reported in 2 Fed. (2) 23, and is also found on page 74 *et seq.* of the Transcript of Record filed herein.

Upon the remanding of the case to the District Court, a new trial was had and at the conclusion of all the evidence on motion of counsel for the defendant, respondent herein, the trial court directed a verdict in favor of the defendant, and the same was accordingly returned by the jury, on which verdict a final judgment was rendered June 5, 1925 (R. 101).

To the latter judgment a writ of error was awarded by the Circuit Court of Appeals for the Fourth Circuit and, after argument of counsel in the latter court, the judgment of the trial court was affirmed on October 25, 1926 (R. 209).

The opinion of the Circuit Court of Appeals, rendered October 19, 1926, is found in 15 Fed. (2) 473, as well as on page 206 *et seq.* of the Transcript of the Record filed herein.

On February 28, 1927, this Court entered an order herein (R. 210), allowing a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review the judgment of that Court.

II. STATEMENT OF FACTS.

At the instance of Southgate and Company, wholesale grocers and distributors, with their principal office in the City of Norfolk, the respondent, The National Bank of Commerce of Norfolk, issued a certain letter of credit in favor of the petitioners, Lamborn and Company, in the following words and figures (R. 8):

"THE NATIONAL BANK OF COMMERCE
OF NORFOLK
LETTER OF CREDIT NO. 105.
NORFOLK, VIRGINIA, May 11, 1920.

Lamborn & Company,
132 Front St.,
New York.

We are establishing a credit in your favor through the Bankers Trust Company of New York under terms and conditions stipulated below.

Opened by: T. S. Southgate & Company, Norfolk, Va., in favor of Lamborn & Company, 132 Front St., New York.

Amount: Fifty-three Thousand One Hundred Twenty-Three Dollars and Eighty-Four Cents ($53,123.84).

Covering: 1000 Bags (of about 224 lbs. each) 10 per cent more or less Java White Sugar at 22 cents per pound, less 2 per cent duty, paid f.o.b. cars, Philadelphia, Pa., landed weights.

Documents: Sight draft with invoice and copy of Ocean Bill of Lading covering shipment Java to Philadelphia, and Order Notify Bill of Lading attached.

Shipment: Shipment to be made during August-September, 1920, at option of the sellers from Java by Steamer or Steamers to Philadelphia.

Credit in Force: January 31, 1921.

This is to be regarded as an irrevocable credit. If impossible to comply with the conditions above stated, communicate with us before making shipment. The conditions embodied in this credit must be adhered to, otherwise payment will not be effected.

Yours very truly,
A. E. WHARTON,
Assistant Cashier."

By subsequent correspondence between all parties concerned it was agreed that from the section denominated "Documents" in the original letter of credit there should be eliminated the requirement of copy of ocean bill of lading covering shipment from Java to Philadelphia (Plaintiffs' Exhibits 27, 47, 28, R. 107-109), but all other terms and conditions in the letter of credit remained as originally set out.

Among the terms and conditions of the letter of credit which thus remained was the provision as to the time and method of shipment. This was the subject of a separate paragraph entitled "Shipment," wherein it was provided:

> "Shipment to be made during August-September, 1920, at option of the sellers from Java by Steamer or Steamers to Philadelphia."

The petitioners' evidence showed that the sugar which was finally tendered by the petitioners under the

letter of credit was shipped on the Steamship "WEST CHESWALD." As will be seen from the evidence this vessel was loaded on the Island of Java at a time more or less indefinite, and, as shown by the ocean bill of lading which the petitioners introduced to evidence the transaction, she was at the time of sailing destined to Port Said with option to New York, and never to Philadelphia. (R. 114-116.)

The evidence shows that on the 13th of December, 1920, this vessel was in the Atlantic Ocean proceeding on her way to New York, and, at the instance of the petitioners, Lamborn and Company, and upon the paying of an extra freight charge of $1.00 per ton for the freight in her owned by them, this vessel was diverted from New York, her original destination, and ordered in to Philadelphia. This is clearly shown by the testimony of Mr. N. Nelson Keen, a member of the petitioner's firm, testifying on their behalf:

> "It was a fact that she was on her way to New York when she was diverted. If we hadn't diverted her she would have come to New York.
>
> Q. And prior to December 13th, 1920, she was never destined to Philadelphia?
>
> A. Not at that time, no, sir." (R. 47)

It was also shown from the evidence that while the letter of credit covers Java White Sugars (R. 8), yet the order notify railroad bills of lading required by the contract and tendered by the petitioners (R. 137), upon which payment under the letter of credit was demanded, showed simply a shipment of Java Sugar and consequently the petitioners failed also to show a compliance with the letter of credit in this essential regard.

These two points were relied upon by the respondent at the first trial, but its contention was not sustained and the verdict was directed in favor of the petitioners. Upon the reversal of the trial judge's action on appeal the matter was then remanded for a new trial, in which a verdict in favor of the respondent was then directed, which action of the trial court was sustained on appeal, and to the final judgment of the Circuit Court of Appeals on the second appeal this Writ of Certiorari was granted. The real question for decision, however, is the correctness of the judgment of the Circuit Court of Appeals on the first appeal. (R. 86, 87.)

The grounds upon which the Circuit Court of Appeals relied in entering this judgment are set out at length in the opinion of Judge Rose, 2 Fed. (2) 23 (R. 74).

The reasons given for his conclusion are stated with his characteristic force and cogency and great reliance is placed thereon by the respondent.

III. CONSTRUCTION OF THE CONTRACT EVIDENCED BY THE LETTER OF CREDIT.

There is nothing novel or intricate in a letter of credit *per se*. It is a contract subject to the same rules of construction and fraught with the same general consequences as other contracts.

As said by Lord Brougham in Orr v. Bank, 1 Macq. H. L. Cas. 513:

> "I am inclined to think that there is no very great novelty or peculiarity in letters of credit to take them out of the general law applicable to mandates. I am not aware that there is anything in the mercantile law, or the custom of merchants

to distinguish letters of credit from any other authority to pay money."

The general subject was under discussion in Bank of Montreal v. Recknagel, 109 N. Y. 482.

The facts of this case were briefly these:

Defendants authorized plaintiff, a foreign bank, to allow a foreign firm to draw for defendants' account against a certain number of bales of Manila hemp, to be purchased and shipped by a certain vessel, advice to be given plaintiff, accompanied by a bill of lading, with abstract of invoice indorsed thereon for the property shipped. Plaintiff accepted, and cashed drafts against "bales of hemp." An abstract of invoice for "bales of Manila hemp" was indorsed on each bill by the consignor after it had been signed by the captain, but without his knowledge. A letter of advice described the shipment as "bales of hemp." The foreign firm failed and absconded, and most of the shipment proved to be matting only; the rest being Manila hemp.

In a unanimous opinion the Court of Appeals makes the following common sense comment upon contracts of this description:

> "Under the agreements effected between the plaintiff and the defendants for the extension of the credit to Vogel & Co., the defendants only became liable to plaintiff to provide for drafts accepted by its London agents within the precise terms upon which the credit was opened. The credit was authorized upon certain conditions prescribed by the parties to be ultimately bound, which they not only had the right to make, but which were assented to by the plaintiff. It is difficult to see how parties could more particularly define the terms of their engagements than was

done in this case * * * In making their arrangements with the plaintiff, the defendants had the right to surround themselves, as to their advances through the plaintiff's agency, with all the safeguards which the nature of the case admitted. The effect of their stipulating in respect of acceptances by plaintiff of Vogel & Co.'s drafts was to protect themselves, as far as was possible, against any unauthorized acts of Vogel & Co. Every lawful provision or condition in the contracts of parties should control, and should not be disregarded in the determination of their rights, if it can be deemed to have entered into the contract with any definite or perceptible purpose. In interpreting their agreements, and in determining the respective obligations, based upon their writings, courts should look at the surrounding circumstances, the situation and relations of the parties, and the subject-matter of their negotiations. In that way, the intention, where there is any uncertainty, is better given effect, and their undertaking is more certain to receive a reasonable and fair interpretation. But when the agreement is determined into which the parties have entered, it is but just and fair that they should be held strictly to it, and all their stipulations we should assume to have been made for a purpose, and to have been considered important by them, and therefore cannot be dispensed with. Hill v. Blake, 97 N. Y. 216. In Banks v. Taaks, 101 N. Y. 442, 5 N. E. Rep. 76, Andrews, J., speaking of the effect of a letter of the defendants, undertaking to accept the drafts of certain parties, said (page 449): 'Assuming that it was a general letter of credit, * * * it nevertheless amounted simply to a contract on the part of Taaks & Lichtenstein to pay advances made in conformity therewith. They had a right to stand upon the very terms of their contract, and they were not bound unless the condition upon which their obligation depended was ful-

> filled.' In Bank v. Griswold, 72 N. Y. 472, Church, C. J., said (page 479): 'It is doubtless true that when the right to draw is limited in amount, or is dependent upon the condition of the performance of some act, or that certain facts exist, it must appear that the draft was within the limit, or that the act constituting the condition has been performed, or the facts exist.' "

For the purpose of the present case the contract between Southgate and Company and Lamborn may well be eliminated, and let it be noted that the position of the respondent is in nowise based thereon.

The contention of the respondent is that Southgate and Company, desiring to purchase certain sugar, caused the National Bank of Commerce of Norfolk to issue the letter of credit in question to and in favor of Lamborn and Company; that thereby the Bank became obligated to Lamborn and Company, subject, however, to the terms and conditions of the letter of credit; that Lamborn and Company by accepting the letter of credit undertook and agreed to perform those terms and conditions as a prerequisite to collection on the letter of credit, and that the Bank in turn relied on the representations of Lamborn and Company, the persons in whose favor the credit was issued, that such terms and conditions would be complied with.

From the relationship of the parties thus created it became absolutely necessary, in order for the Bank to claim reimbursement from Southgate and Company, that it should show that it had paid Lamborn only when the latter had strictly complied with the provisions of the letter of credit. Anything short of this would have imposed an ultimate liability upon Southgate and Company without their consent and contrary to the undertaking of the parties.

It will thus be seen that the position of the respondent is in no sense dependent upon any independent agreement between Southgate and Lamborn. What the respondent contends is that Lamborn was to make a tender of the sugar which, in every way, met the requirements of the contract evidenced by the letter of credit, both as to amount and quality, as well as time, place and manner of shipment and ultimate destination. Failing in this Lamborn could not hold the Bank liable on the letter of credit, and the Bank in turn, upon ignoring the requirements of the letter of credit, which had been procured by Southgate, and by paying Lamborn when the latter had failed to comply with those terms, could not look to Southgate and Company for reimbursement. It is therefore apparent that the action of the Bank in requiring strict performance by Lamborn of the terms provided in the letter of credit was not dictated by whim or caprice, but by a recognition of the necessity, when it came to collect from Southgate, of showing that it had paid only in accordance with the terms of its contract which Southgate and Company had procured from it. Such a rule is only in accordance with the principle laid down in Bank v. Griswold (*supra*), wherein the Court uses the following language:

> "It is doubtless true that when the right to draw is limited in amount, or is dependent upon the condition of the performance of some act, or that certain facts exist, it must appear that the draft was within the limit, or that the act constituting the condition has been performed, or the facts exist."

The Bank insists upon the application of the principle embodied in this well recognized rule. As will

be hereafter shown, Lamborn and Company have failed to comply with the terms of the letter of credit under which they claim and consequently are not entitled to recover thereon against the respondent.

IV. THE CONTRACT REQUIRED THAT SHIPMENT WHEN MADE SHOULD BE FROM JAVA TO PHILADELPHIA.

A. State Courts Uphold Respondent's Position.

The Contract Provides:

> "Shipment to be made during August-September, 1920, at option of the sellers from Java by Steamer or Steamers to Philadelphia."

There is also a provision as to what documents should be furnished when payment is demanded on the draft. This provision is as follows:

> "Sight draft with invoice and copy of Ocean Bill of Lading covering shipment Java to Philadelphia, and Order Notify Bill of Lading attached."

The requirement to furnish "Copy of Ocean Bill of Lading covering shipment Java to Philadelphia," was subsequently dispensed with. (R. 107-109.) Dispensing with this requirement did not, however, change the character of shipment as regards manner, time, place, destination or otherwise, but the change was prompted alone by the supposed inconvenience of furnishing so many copies of a voluminous document, there being a large number of lots of sugar consigned to different customers of Lamborn & Company.

In the letters permitting the omission of the copy of the ocean bill of lading it is provided as follows:

> "All other terms and conditions of this credit are to remain unchanged." (R. 107-109.)

It will thus be seen that the obligation of Lamborn and Company was changed in no particular except in the one matter of furnishing a copy of the Ocean Bill of Lading. They were still obligated to ship the sugar to Philadelphia in the months specified and from and to the places specified, and the original Ocean Bill of Lading was not to be changed in any particular. Otherwise it would have been impossible to furnish a "Copy of Ocean Bill of Lading covering shipment Java to Philadelphia."

The Ocean Bill of Lading contemplated to be issued at the inception of the shipment necessarily had to specify the termini of the voyage—Java to Philadelphia. It therefore followed that in order for the sugar tendered by Lamborn and Company to meet the requirements of the letter of credit it must have been sugar that from the time of shipment in Java was impressed with an ultimate and unconditional destination in Philadelphia. Otherwise how would it have been possible to obtain an Ocean Bill of Lading covering shipment from Java to Philadelphia?

The Bill of Lading of the Steamer "WEST CHESWALD", which was actually produced when payment was demanded (R. 114-116), shows that it was a shipment from Java to Port Said, option New York, and never to Philadelphia.

Ledon v. Havemeyer, 121 N. Y. 179.

This was a contract for the sale and purchase of sugar made in New York, where the vendees resided, the vendors being residents of Cuba, and the sugar was intended to be shipped from some port in that island to the defendants in New York. It will thus be seen that the contract in question so far as the ultimate destination of the sugar was concerned was identical as to requirements with that in the present instance. In other words, in one case the sugar was to be shipped from Cuba to New York, and in the other the shipment was to be from Java to Philadelphia.

This case is illuminating as showing that this requirement could only be met by a shipment of the sugar on a vessel destined at the time of shipment for New York. In other words, that the goods sold should be loaded in Cuba on a vessel bound for New York with the intent in good faith to have them cleared for the port of destination.

The following language from the opinion fully substantiates this statement:

> "This contract, like all others, must be construed with reference to the intent of the parties making it, and if its language is plain and unambiguous, it must be given that construction which the language fairly imports, and the question of its meaning is a question of law for the court. *That meaning, we think, is the putting the goods sold on board a vessel bound for New York, with the intent in good faith to have them cleared for the port of destination in the regular course of trade,* or in a reasonable time after the shipment."
>
> * * * * * * * * *
>
> "It is, of course, implied by this language, and the surrounding circumstances, that *the shipment*

was to be made in Cuba upon a vessel bound for New York, and if there was no regular line making trips to the port of destination from the shipping port, that the plaintiffs would supply, in some way, the means of transportation to perform the service required."

* * * * * * * * *

"We think the plaintiffs, under this contract, were not required to hire a special ship for the purpose of transporting the goods, if that object could be otherwise reasonably attained; *but they, undoubtedly, would be bound to ship on some vessel destined for the Port of New York,* which they had reason to suppose would sail within a reasonable time after shipment had been made." (Italics ours.)

It will thus be seen that the requirement of the contract is a fixed destination of the vessel at the time of shipment, and not a destination that may later be determined upon by the sellers long after the vessel has sailed, without the consent of the buyer, to meet the caprice, whim, or selfish interest of the sellers.

Iasige v. Rosenstein, 141 N. Y. 414.

In this case the contract provided for "March steamer shipment from Turkey." The goods were shipped upon a steamer sailing from Turkey in March, but were transshipped at Liverpool and brought to New York in another vessel. The question involved was whether or not the contract required a direct and unbroken voyage. In disposing of this question the Court uses the following language:

"Observe the language of primary description, that intended to identify the goods, and prescrib-

ing the date and character of the first shipment. There are two elements provided: First, the property bought is to be 'good merchantable Smyrna canary seed,' and, second, 'March steamer shipment from Turkey.' That ends the description of what was agreed to be bought, for the note goes at once to the question of price, and other details of the contract. *Plainly, for some reason, the parties contented themselves with saying simply 'shipment from Turkey,' and omitted to add 'to New York,' or other words indicating a direct or unbroken voyage; and this omission occurs in the formal description of the goods, and where it was not to be expected if a direct voyage was meant.*" (Italics ours.)

There is but one conclusion to draw from this opinion and that is that had the contract provided for "March steamer shipment from Turkey to New York," it would have required a direct and unbroken voyage. By the same token a requirement of "September shipment Java to Philadelphia" required a like direct and unbroken voyage from Java to Philadelphia.

Firemen Insurance Company v. Lawrence, 14 Johnson (N. Y.) 56.

This was a suit on a marine policy where there had been an abandonment of the original voyage and the substitution of another port in place of the original terminus *ad quem*. The Court said:

"A voyage imports a definite commencement and end. It is known and characterized by its *termini*. They are the recognized tests of its identity.

* * * * * * * *

> But if the original place of destination be abandoned, in order to go to another port of discharge, the voyage itself becomes changed, because one of the *termini* of the original voyage is changed. The identity of the voyage is gone, and a new distinct voyage is substituted."

The identity of the voyage of the steamer carrying the sugar which was the subject of the contract was to be determined at the time of the shipment. It was not a voyage from Java to New York, or from Java to Port Said, option New York, or a voyage from Java to New York with a diversion to Philadelphia a few hours prior to its conclusion, but it was to be a voyage with a definite commencement and end, defined prior to its beginning. The parties went into great detail in specifying the termini, and it is always presumed in mercantile contracts, such as this, that they had their own reasons for so doing. Reasons, so long as they are legal, are not subject to revision by the Court. Southgate and Company were not buying one thousand (1000) bags of Java White Sugar, but one thousand (1000) bags of Java White Sugar, loaded and shipped at a certain time, in a voyage characterized by definite termini, namely, Java and Philadelphia, which termini were fixed in advance of the movement of the merchandise. And likewise by the terms of the letter of credit the Bank was only required to honor a draft drawn against Java White Sugar which had been shipped during August-September, 1920, from Java to Philadelphia.

Woodruff v. Noyes, 15 Conn. 334.

The facts of this case were these:

Justus Chollar, residing at Brooklyn, Connecticut,

called upon the plaintiffs, who were manufacturers of iron castings in Hartford to know the terms upon which he could procure a quantity of plow castings to be made at their foundry and to be furnished on a credit; he, upon his return to Brooklyn, to inform the plaintiffs further upon the subject. On the 4th of November, 1839, Chollar wrote to the plaintiffs informing them what quantity of castings he would take upon the terms discussed when he was in Hartford, on a credit of six months from the first day of the following April, in which letter he added: "Please ship to the care of F. W. Bushnell." This letter was duly received by the plaintiffs; but no answer was returned. On the 27th of November the plaintiffs shipped the castings so ordered by a vessel bound to Norwich, then at Hartford; this being the usual mode of transportation. They were directed to Justus Chollar, Brooklyn; but not to the care of F. W. Bushnell, Norwich, and bills of lading were given accordingly. The question involved was whether by reason of the failure to ship in accordance with the instructions which became a part of the agreement, the title to the castings passed to Chollar. The Court disposed of the question in this manner:

> "Considering the contract between the plaintiffs and Chollar to be, that the latter would purchase the property in question, on condition that it should be directed agreeably to the orders contained in his letter, it is clear, that, as it was not so directed, the court below correctly instructed the jury that Chollar was not bound to receive it; and that, therefore, unless he waived a performance by the plaintiffs of this condition, the title to the property would not vest in Chollar, but would re-

main unchanged in the plaintiffs. It was the duty of the plaintiffs, if they would bind Chollar to the acceptance of the property, not only to send it to him within at least a reasonable time, but also to comply with the condition on which it was to be purchased, as to the manner in which it was to be transmitted. This being prescribed in the contract, we cannot say, that it was not essential."

Jones v. Schneider, 22 Minn. 279.

The facts and principles laid down in this case are peculiarly in point in the present instance.

"In April, 1874, defendant gave plaintiffs, through their agent, a written order in these words: 'You will please ship to me from the factory to Bass Lake station, care of J. H. Lohman, on or before the 1st day of July, 1874, one of the Marsh harvesters, for which I agree to pay you or your agent, in cash and notes, on the arrival of the machine, two hundred and twenty dollars, as follows: note, $110, Nov. 1, 1874; note for $110, due Nov. 1, 1875, with interest.' At the time when the order was given, plaintiffs' agent agreed to sell and ship the harvester in accordance with the terms of the order. Plaintiffs shipped a lot of harvesters from the factory to Minneapolis, without selecting any particular one for defendant, and on June 26, 1874, shipped one of the lot from Minneapolis to Bass Lake station, where it arrived as early as some time in July, 1874."

The plaintiffs brought an action for goods sold and delivered for the purpose of recovering the purchase price of the harvester. It thereupon became necessary in order for the plaintiffs to recover to show that the article had been shipped in accordance with the terms

of the contract, these terms being that the same should be shipped by the plaintiffs from their factory to the defendant at Bass Lake Station. The harvester was not shipped from the factory, but was shipped from the factory to Minneapolis, from which point it was ultimately shipped to Bass Lake Station.

The analogy between the facts of that case and the present are at once apparent. The sugar in question was not shipped by Lamborn from Java to Philadelphia, but was shipped from Java to New York and afterwards diverted. The Court disposed of the matter in the following language:

> "Now, the authority given by the defendant to the plaintiff in the case at bar was to ship 'to me from the factory to Bass Lake Station,' etc. This authorized the plaintiffs to select and appropriate a harvester for the defendant, by shipping it to him from the factory to Bass Lake Station; and if a harvester had been so shipped, the shipment would have appropriated the harvester to defendant, and have vested the property thereof in him, and the shipment would have been a delivery. But the harvester was not shipped to defendant from the factory to Bass Lake Station, but was one of a lot shipped from the factory to Minneapolis (without the designation of any particular machine for defendant), and from Minneapolis the shipment was made to Bass Lake Station. The shipment, not being made in accordance with the terms of the contract, did not pass the property in the machine to defendant, or operate as a delivery thereof to him. Benjamin on Sales, 263-5; *Corning v. Colt,* 5 Wend. 253; *Hills v. Lynch,* 3 Robt. 42.
>
> It may be that the difference between the manner in which the shipment was ordered to be made and that in which it was made was, in fact, of little or

> no material consequence in itself, so far as we can see; but the contract of the parties must govern. *It is not for the court to speculate upon the importance of stipulations which contracting parties see fit to insert in their agreements.*" (Italics ours.)

This Court will not overlook the significant statement in the opinion quoted that, "It is not for the Court to speculate upon the importance of stipulations which contracting parties see fit to insert in their agreements."

As was aptly said by Judge Learned Hand in Mitsubishi Goshi Kaisha v. J. Aron & Co., Inc., 16 Fed. (2) 186:

> "There is no room in commercial contracts for the doctrine of substantial performance."

This language is peculiarly applicable in the present instance. Southgate & Company procured from the respondent bank a letter of credit which was only to be payable upon the compliance by Lamborn & Company with certain stipulations. The interest of the bank in the transaction was simply to so comply with the stipulations of the letter of credit procured from it by Southgate & Company as to enable it, upon the payment of the amount provided for therein, to collect from Southgate & Company. Whether these provisions were important or not it was not for the bank to say. Its sole interest was that there should be a compliance with those conditions which were a prerequisite to its collection from Southgate & Company. It could not waive these requirements except at its peril, and it would have been guilty of the grossest bad faith had it attempted to do so and then endeavored to recover

against Southgate & Company. It had but one rule of conduct outlined for its guidance and that was to live strictly up to the terms of the letter of credit and to request Lamborn & Company in whose favor the same was issued to do likewise. Failing in this, it would have been untrue to its trust and, as a consequence, unable to have collected. Paraphrasing the language of the Minnesota Court, it was not for the bank to speculate upon the importance of the stipulations which Southgate & Company had seen fit to insert in this agreement.

The position of the bank was clearly outlined in the testimony of Mr. Wharton, its Cashier (R. 65) where he says:

> "We understood our terms of the credit were that the shipment was to be from Java to Philadelphia, and that was our reason for not paying * * * We were at all times ready and able and willing to pay that letter of credit in accordance with its terms and had no other interest in this matter except to live up to the letter of credit."

The foregoing cases well illustrate the established doctrine that to comply in a sale of certain specified property, specifically described, it is not sufficient that the seller deliver other property of the same grade and quality. The purchaser is bound to accept only the specified property to which the contract relates.

This principle is elaborately discussed and illustrated in a note in 35 L. R. A. (N. S.) 290, *et seq.* As illustrating this principle the note refers to the case of Hesser v. Chicago & W. Coal Co. (C. C. A. 7th Cir.) 151 Fed. 211, in which it was held that it is not a substantial compliance with a contract to sell coal from a certain

colliery, to tender coal just as good from the same district, but from a different colliery, and the seller is not entitled to have submitted to the jury the question whether the coal tendered was in fact of the same quality as that described in the contract.

Shackelford v. Sloss Iron & Steel Co., 140 Ala. 329, is likewise in point. The Court there held that a contract to sell the output of a certain quality of ore from the contractor's mine, for a stated period of time, is descriptive of the ore sold, and the contract cannot be complied with by tendering ore from any other mine.

Numerous other cases cited in this note will give additional applications of this rule.

B. Canada Supreme Court Upholds Respondent's Position.

In California Prune and Apricot Growers, Incorporated, v. Baird & Peters, decided by the Supreme Court of Canada, December 10, 1925, (1926) (Can.) S. C. 208, the Canada Supreme Court in an elaborate opinion with liberal quotations from the opinions in Bowes v. Shand, Norrington v. Wright, and Filley v. Pope, all of which will be referred to and discussed hereafter in this brief, upheld and applied the principle contended for by the respondent.

The facts of the case were briefly these:

The appellants under a written contract sold to the respondents a carload of prunes to be delivered f. o. b. Pacific Coast Shipping point. The contract provided that ultimate destination of the shipment should be St. John, N. B. and that routing instructions to this ultimate destination should be given by the purchaser to the seller. Thereafter routing instructions were given in writing to the agent of the seller and provided that

the car should be routed over the Canadian National Railways from Chicago to St. John, its destination. The car was, however, in fact routed over the Canadian Pacific Railway to St. John, and upon its arrival there, the buyers refused to accept the goods, holding that the failure to comply with their routing instructions entitled them to repudiate. The question presented to the Court was whether the breach complained of, namely, the failure of the seller to route the goods in accordance with the contract, gave the buyer the right to reject and treat the contract as repudiated. The Court quotes Williston on Sales (2nd. Ed.) P. 585, as follows:

> "the property will not pass if the goods are too many, or too few or they are sent at a materially different time, or by a different route or method of shipment, or are misdirected."

and concludes:

> "In that view, the mode of shipment is a material and indeed an essential term of the contract. The consequence is that its non-performance is not 'an unimportant variation,' which may, under the present contract be excluded as constituting a 'basis for a claim;' but, on the contrary 'may fairly be considered by the other party as a substantial failure to perform the contract at all.'"

The Supreme Court, for the reasons given, thereupon upheld the action of the two lower courts of New Brunswick, which had decided that the sellers were not entitled to recover from the buyers, for the reason that they had failed to route the goods as provided in the contract.

It will be observed in this case that the ultimate des-

tination of the goods from the time they were shipped from the Pacific Coast was St. Johns, New Brunswick, but the fact that they moved over a railroad contrary to the directions of the buyers absolved them from liability.

In the present case the sugar in question was never destined to Philadelphia until about 24 hours before it arrived, and for the greater part of the voyage was destined to another point, namely, New York. The claim of Lamborn and Company therefore is far weaker than that of the sellers in the Canadian case.

C. The Doctrine of The United States Supreme Court.

By way of introduction to what we believe to be controlling decisions of the Supreme Court of the United States we have heretofore called attention to some of the most apposite decisions of other Courts, which we believe should commend themselves to this Court, not by way of their controlling authority, but by reason of their common sense and well reasoned conclusions.

We now invite the attention of this Court to certain of its own expressions which recognize and apply the same principle and which we believe to be decisive of the present question.

Filley v. Pope, 115 U. S. 213.

The facts were quite similar to those in the instant case.

The defendant bargained for and bought of the plaintiffs and they sold to him five hundred tons of Scotch pig iron, at the price of $26.00 per ton to be paid in cash by the defendant upon the delivery to him of the

iron at New Orleans; the iron to be shipped from Glasgow, Scotland. The execution of the contract was not in dispute but the evidence established the fact that the iron which was at the works of the producers in Scotland at a point equidistant from the ports of Glasgow on the west coast and of Leith on the east coast, instead of being shipped from Glasgow as provided in the contract, was shipped from Leith, owing to the fact that shipment from the latter point was more expeditious, and, as a result thereof, a more satisfactory delivery at New Orleans could be made.

At the trial the Court instructed the jury that the provision of the contract that the iron was to be shipped from Glasgow was not material; that the purpose of the contract was the sale by the plaintiffs to the defendant of a certain quantity of iron to be delivered at a certain time at a certain place, and the fact that it was shipped from Leith instead of Glasgow was not material to the rights of the parties in the case, if the other provisions of the contract were complied with, and if the jury found that it was impossible for the plaintiffs to obtain a vessel from Glasgow, and that it was practicable to obtain one from Leith, and that shipment from Leith was a more expeditious way of getting the iron to New Orleans than waiting for a vessel from Glasgow would have been, then the plaintiffs were justified in shipping the iron from Leith instead of from Glasgow.

There was verdict and judgment for the plaintiffs and on appeal the correctness of this construction was the question before the Court.

The Supreme Court in a unanimous decision held that in a mercantile contract, a statement descriptive of the subject-matter, or of some material incident, such

as the time or place of shipment, is to be regarded as a warranty, or condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract. The Court disposed of the contention in the following language, which we believe equally applicable to the case at bar:

> "The thing sold, and described in the contract, is '500 tons No. 1 Shott's (Scotch) pig iron,' to be shipped from 'Glasgow as soon as possible.' It is not merely 500 tons of iron of a certain quality; nor is it such iron to be shipped as soon as possible from any Scotch port or ports; but it is iron of that quality to be shipped from the particular Port of Glasgow as soon as possible. The court has neither the means nor the right to determine why the parties in their contract specified 'shipment from Glasgow' instead of using the more general phrase 'shipment from Scotland,' or merely 'shipment,' without naming any place; but is bound to give effect to the terms which the parties have chosen for themselves. The term 'shipment from Glasgow' defines an act to be done by the sellers at the outset, and a condition precedent to any liability of the buyer. The sellers do not undertake to obtain shipment, nor does the buyer agree to accept iron shipped, at any other port. The buyer takes the risk of delay in getting shipment from Glasgow, or of delay or disaster in prosecuting the voyage from Glasgow to New Orleans. But he does not take the risk of delay or of sea perils which may occur in the course of the different voyage from Leith to the same destination.
>
> "One or two illustrations may help to make this clear. If the sellers had shipped the iron by the first opportunity from Glasgow, the buyer could not have refused to accept it, even if it could have been shipped sooner from Leith. Again, the buyer would have an insurable interest in the iron

> during the voyage, by reason of the title which would accrue to him under the contract on arrival and delivery, and of the profits that he might make in case of a rise in the market. (Citing cases.) But a policy of insurance upon the iron for a voyage from Glasgow would not cover a voyage from Leith."

Applying the same principle to the present case, it is not merely one thousand bags of Java white sugar that Southgate and Company were purchasing and in payment of which they obtained a letter of credit embodying the terms set out, nor is it such sugar to be procured or shipped in any manner that Lamborn should elect, but it is sugar of that quality to be shipped at a certain time from the Island of Java by steamer or steamers to Philadelphia. Neither the Court nor the Bank has the means nor the right to determine why Lamborn and Southgate in their contract specified "Shipment from Java to Philadelphia," but they are bound to give effect to the terms which the parties have chosen for themselves. The term "shipment from Java to Philadelphia" defines an act to be done by the sellers at the outset and is a condition precedent to any liability of the buyer. Southgate and Company do not agree to accept sugar shipped from the ports of any other country than Java, nor at any other than the designated time, nor to any other port than Philadelphia, and until the sellers have tendered sugar that has been so shipped they have failed to show a compliance with the terms of their undertaking.

Southgate and Company had an interest in the sugar during the voyage, by reason of the title which would accrue to them under the contract on arrival and delivery, and of the profits that they might make in case

of a rise in the market, and, as pointed out by the Court, a policy of insurance upon the sugar for a voyage from Java to Philadelphia would not cover sugar en route from Java to New York, yet this is admittedly the condition of the sugar in question, according to the petitioners, from September 30th until December 13th, a period of seventy-five days, when, at the expiration of which time and when the vessel was but two days' distant from the American coast, she was diverted from her original destination of New York into the port of Philadelphia, in order to meet the exigencies of Lamborn and Company's then situation.

The learned trial judge on the first trial failed to grasp the underlying principle enunciated by the Supreme Court in Filley v. Pope. A few quotations from the opinion rendered by him from the bench in overruling the defendant's motion for a directed verdict on the plaintiff's evidence will substantiate this statement. He says (R. 50, 51):

> "The second point that the shipment had to be from Java to Philadelphia from its inception without any diversion after the ship had left the original port of loading seems to me to find such support as there may be said to be to that position in the right of the purchaser of the sugar to insure his interest and his profits, and if that be true, that condition would not apply in the case of a guarantor like a bank furnishing a letter of credit, and in determining the question of compliance with the terms of the letter of credit, it seems to me the only guide can be the terms of the letter of credit itself. That provides that shipment be made during August and September, 1920, at option of seller by steamer or steamers from Java to Philadelphia. There isn't any suggestion that the shipment was not from Java and it is equally

true and a concession in the case that the ultimate destination of the steamer was Philadelphia. It happens that that destination was accomplished, as Mr. Taylor points out, as the result of a subsequent arrangement with the owner of the steamer just three days out of port by which in consideration of a bonus freight rate, she was diverted from New York, her original destination, to Philadelphia. If we were dealing with a contract between Southgate & Company and Lanborn & Company in which the contract required that they should designate the ship on which the cargo was to be loaded and which was to be used for the transportation of the cargo, that, of course, would be an essential part of the contract and the insurable interest which the Supreme Court spoke of in the Scotland case, the steel case, would at once arise when the declaration was made, and I can very readily understand that an insurable interest in a contract requiring a shipment of sugar to Philadelphia might not obtain in a case of a shipment to New York, but, as I intimated a moment ago, that contract is not in evidence in this case. I don't know what its terms may be, and the suit is on a letter of credit issued by the bank."

This language evinces a misconception of the relation of the Bank to the letter of credit. The Bank in furnishing this letter of credit at the instance of Southgate in favor of Lamborn was not a guarantor, but by the very terms of the instrument it became primarily liable to Lamborn, upon the express understanding, however, that "*the conditions embodied in this credit must be adhered to, otherwise payment will not be effected,*" and the provision upon which the defendant relied and, as we conceive, justly, was a provision in the letter of credit itself, incorporated therein at the

instance of Southgate, against whom recovery could be ultimately had upon the payment by the Bank to Lamborn only according to the terms of said letter and upon compliance by the Bank with all of the provisions therein. The statement of the trial court is that were it dealing with a contract between Southgate and Lamborn in which there was a requirement that Lamborn should designate the ship on which the cargo was to be loaded and transported, that that would be an essential part of the contract and the insurable interest which the Supreme Court spoke of in the Filley case would at once arise when the declaration was made. This statement is made in entire disregard of the provisions of the contract in the Filley case. They were in writing and are fully set out in the opinion as follows:

> "St. Louis, February 20, 1880. Thomas J. Pope & Bro., New York: Have sold for your account to Mr. O. B. Filley, St. Louis, 500 tons No. 1 Shott's (Scotch) pig iron, at $26 per ton cash in bond at New Orleans. Shipment from Glasgow as soon as possible. Delivery and sale subject to ocean risks.
>
> Very truly,
> WILLARD & COMBS."
>
> "Accepted,
> O. B. FILLEY."

It will thus be seen that the elements of difference that the trial court assumed to exist between the Filley case and the instant case are entirely lacking. The defendant did not rely upon the provisions of the contract between Lamborn and Southgate, but did rely upon the letter of credit issued by it at the instance of Southgate in favor of Lamborn, which fully set out the

conditions under which it was to be liable to Lamborn, which conditions Southgate and Company had an absolute right to insist upon, and from which the respondent would have departed only at its own risk.

The trial court again says (R. 51.:

> "I can't imagine that the contract contemplates or requires that there must have been all the time, from the inception of the voyage, the intention and purpose to send the vessel to Philadelphia."

Why not?

This position can be completely answered in the language of the Supreme Court by saying that the buyer takes the risk of delivery or sea perils which may occur in the course of a voyage from Java to Philadelphia, but does not take the risk of delivery or disaster which may occur in the course of a voyage from Java to Port Said, and, upon the exercise of the option of the sellers, from Port Said to New York, and, by diversion from the latter voyage shortly before docking, to Philadelphia. And in further answer to the same suggestion that the requirement does not contemplate a continuous intention and a continuous shipment from Java to Philadelphia, in the language of the Supreme Court it can be said that the requirement of shipment from Java to Philadelphia "defines an act to be done by the sellers at the *outset* and a *condition precedent* to any liability of the buyer." (Italics ours.)

The uncertainty and confusion resulting from the conclusion that the contract did not require a continuous intention from the inception of the voyage to send the vessel to Philadelphia is well illustrated in this case. From the time the "WEST CHESWALD" left

Java, about October 1st, until the 13th day of December, 1920, there was apparently, so far as the record discloses, no intention on the part of any one that the "WEST CHESWALD" should dock and unload at any other port but New York. The testimony of all of the witnesses, including those for the petitioners, is characterized by the utmost frankness.

The testimony of Francis C. Gawel, a clerk of the Tracy Steamship Company (R. 19-21), clearly sets out the situation existing prior to, and at the time of, diversion. He says:

> "I had a telephone conversation with Mr. B. W. Dyer, a member of the firm of Lamborn & Company, concerning the Steamship "WEST CHESWALD," Mr. Dyer asking me whether we would consider sending the "WEST CHESWALD" to Philadelphia instead of New York. I told him, as far as I can remember, that it would all depend on how Lamborn & Company's sugar was stowed, and to obtain this information I radioed the Master at his request."

Then follows his testimony giving in detail his efforts to obtain the information desired. The witness then proceeds:

> "Our next step after receiving the Captain's radiogram was an immediate communication with United States Shipping Board by telephone. I told the Shipping Board the contents of the Captain's radiogram, and asked if they would consider sending the "WEST CHESWALD" to Philadelphia instead of New York. They authorized me to divert this steamer to Philadelphia at an additional freight charge of $1.00, which charge was to be made against Lamborn & Company. By telephone I communicated with Lamborn & Com-

pany, talking to a man who gave his name as Mr. Dyer. He said that he would consult with his company and let me know. Afterwards he telephoned me and said to go ahead and divert the steamer to Philadelphia, that his company was agreeable to paying the extra $1.00 per ton freight."

It will thus be seen that up until December 13th, 1920, Lamborn & Company had absolutely no control over the "WEST CHESWALD," or her freight, so far as changing her destination was concerned, and on that day, when, for the first time, they deemed it to their interest to divert the vessel, there were a number of conditions that had to be met, over none of which they, Lamborn & Company, had control, before the vessel could be diverted to Philadelphia.

Let us consider the following circumstances as showing Lamborn's lack of control over the vessel (R. 19-21):

1. Dyer telephones Gawel as to whether his Company would consider diverting the "WEST CHESWALD" to Philadelphia instead of New York.

2. Gawel tells Dyer that this would depend on how Lamborn's sugar was stowed.

3. It was necessary to obtain this information by radiogram from the Captain.

4. The consent of the Shipping Board was necessary to divert the vessel to Philadelphia.

5. The payment of an additional freight charge of $1.00 per ton was required.

And then and only then was the option given to Lamborn, who, after consultation among the members of the firm, agreed to divert the vessel.

To say that a shipment which was never originally intended for Philadelphia but which finally arrived

there under such conditions and surrounded by such uncertainties, is a shipment from Java to Philadelphia, is stretching to the breaking point the language of the contract requiring a shipment "during the months of August-September from Java to Philadelphia."

Norrington v. Wright, 115 U. S. 188.

The same principle was recognized in this case as in that of Filley v. Pope, and the Court unanimously held that in a mercantile contract, a statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is to be regarded as a warranty or condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract.

The opinion in this case is peculiarly interesting by reason of its copious citations with approval of the various opinions delivered in the House of Lords in Bowes v. Shand, 2 App. Cas. 455.

The following extract is particularly in point:

> "In that case, two contracts were made in London, each for the sale of 300 tons of 'Madras rice to be shipped at Madras or coast, for this port, during the months of March and/or April, 1874, per Rajah of Cochin.' The 600 tons filled 8,200 bags, of which 7,120 bags were put on board and bills of lading signed in February; and for the rest, consisting of 1,303 bags put on board in February, and 50 in March, the bill of lading was signed in March. At the trial of an action by the seller against the buyer for refusing to accept the cargo, evidence was given that rice shipped in February would be the spring crop, and quite as good as rice shipped in March or April. Yet the

House of Lords held that the action could not be maintained, because the meaning of the contract, as apparent upon its face, was that all the rice must be put on board in March and April, or in one of those months.

"In the opinions there delivered, the general principles underlying this class of cases are most clearly and satisfactorily stated. It will be sufficient to quote a few passages from two of those opinions.

"Lord Chancellor Cairns said: 'It does not appear to me to be a question for your Lordships, or for any Court, to consider whether that is a contract which bears upon the face of it some reason, some explanation, why it was made in that form, and why the stipulation is made that the shipment should be during these particular months. It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance.' 2 App. Cas. 463. 'If it be admitted that the literal meaning would imply that the whole quantity must be put on board during a specified time, it is no answer to that literal meaning; it is no observation which can dispose of or get rid of or displace that literal meaning, to say that it puts an additional burden on the seller, without a corresponding benefit to the purchaser; that is a matter of which the seller and the purchaser are the best judges. Nor is it any reason for saying that it would be a means by which purchasers, without any real cause, would frequently obtain an excuse for rejecting contracts when prices had dropped. The non-fulfillment of any term in any contract is a means by which a purchaser is able to get rid of the contract when prices have dropped; but that is no reason why a term which is found in a contract should not be fulfilled.' Pp. 465, 466. 'It was suggested that even if the construction of the contract be as I

have stated, still if the rice was not put on board in the particular months, that would not be a reason which would justify the appellants in having rejected the rice altogether, but that it might afford a ground for a cross-action by them if they could show that any particular damage resulted to them from the rice not having been put on board in the months in question. My Lords, I cannot think that there is any foundation whatever for that argument. If the construction of the contract be as I have said, that it bears that the rice is to be put on board in the months in question, that is part of the description of the subject-matter of what is sold. What is sold is not 300 tons of rice in gross or in general. It is 300 tons of Madras rice to be put on board at Madras during the particular months.' 'The plaintiff, who sues upon that contract, has not launched his case until he has shown that he has tendered that thing which has been contracted for, and if he is unable to show that, he cannot claim any damages for the non-fulfillment of the contract.' Pp. 467, 468.

"Lord Blackburn said: 'If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties bargained for was rice, shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras. I do not quite know what the boundary is, and probably equally good rice might have been shipped in February as was shipped in March, or equally as good rice might have been shipped in May as was shipped in April, and I dare say equally good rice might have been put on board another ship as that which was put on board the Rajah of Cochin. But the parties have chosen, for reasons best known to themselves, to say: We bargain to take rice shipped in this particular region, at that particu-

lar time, on board that particular ship; and before the defendants can be compelled to take anything in fulfillment of that contract it must be shown not merely that it is equally good, but that it is the same article as they have bargained for; otherwise they are not bound to take it.' 2 App. Cas. 480, 481."

Lowber v. Bangs, 2 Wall. 728.

The question involved in this case was a stipulation in a charter party providing "the ship to proceed from Melbourne to Calcutta with all possible dispatch." The Court held that this meant that the ship was to proceed direct from one place to the other and that time was of the essence of the contract.

The following extract from the opinion of the Court is peculiarly applicable to the present case:

"Promptitude in the fulfillment of engagements is the life of commercial success. The state of the market at home and abroad, the solvency of houses, the rates of exchange and of freight, and various other circumstances which go to control the issues of profit or loss, render it more important in the enterprises of the trader than in any other business. The result of a voyage may depend upon the day the vessel arrives at her port of destination, and the time of her arrival may be controlled by the day of her departure from the port whence she sailed. We cannot forget these considerations in our search for the meaning of this contract. That the parties could have intended that when the vessel left Melbourne she might wander in any direction over the Indian seas, and that whenever and wherever she should receive intelligence of the contract, she might proceed to Calcutta and claim its fulfillment by the char-

terers, strikes us as incredible. So to hold, we think, would be to make a new contract for the parties, and not to execute the one they have made. We cannot give any other construction to the language, 'The ship to proceed from Melbourne to Calcutta with all possible dispatch,' than that she was to proceed direct from one place to the other, and that to this extent, at least, time was intended to be made of the essence of the contract. We lay out of view the state of things at Calcutta when the vessel arrived there. To allow that to control our conclusion, would be to make the construction of the contract depend, not upon the intention of the parties when it was entered into, but upon the accidents of the future."

This quotation, we believe, shows that there must be an original intention consistently adhered to throughout that the shipment from its inception to its termination be made in accordance with the *termini* set out in the contract, and should not be dependent upon future accident, chance, or caprice in the ultimate delivery of the subject-matter of the contract at the *terminus ad quem*.

D. ADDITIONAL ENGLISH CASES.

In Section 280 of Williston on Sales (2nd Ed.), there is a discussion of the obligation of the seller, when goods are to be shipped to the purchaser. The author says:

"There must always be a bill of lading showing the shipment of the goods by proper route, and there must always be a proper insurance policy. The bill of lading must be procured on shipment. * * *"

There are two English cases, among others, cited in support of this proposition which we believe supplement and sustain the authorities heretofore cited.

"In Hansson v. Hamel and Horley, Ltd., (1922) A. C. 36, a Swedish merchant agreed to sell to an English company a quantity of guano in bags c.i.f. Norway to Kobe or Yokohama, terms net cash against documents in London; time of shipping as to the first installment March/April, 1920. The seller, in anticipation of his obligations under the contract, agreed with L., the agent at Hamburg of a Japanese company, which ran a line of steamers from Hamburg to Japan but ran no steamers from Norway, for the conveyance of the guano from Hamburg to Japan on the terms that L. should sign through bills of lading as soon as the goods were in his possession. Between April 20 and 22 the guano was shipped by the sellers in several lots from various Norwegian ports, including B., on the steamship K to Hamburg. On the arrival of the goods at Hamburg, L. signed several documents in identical terms, called through bills of lading, bearing date May 5. The bill of lading relating to the B. consignment stated that the goods were shipped in apparent good order and condition on board the K. lying at B. and bound for Hamburg, for transshipment into the Japanese Company's steamer A., to be delivered in the like good order and condition at the port of Yokohama unto 'order,' and the margin contained the statement: 'Shipped from B. according to bill of lading on the 22nd April, 1920.' On May 12, the seller tendered to the buyers documents relating to the first installment, including the ocean bills of lading, but the buyers rejected the documents and refused to take up the goods. In an action for the price of the goods, it was held first, that the ocean bills of lading were not through bills of lading, *inasmuch as they afforded no protec-*

tion to the buyers on the initial voyage, and did not satisfy the conditions of the contract; secondly, that on a sale on c.i.f. terms *the contract of affreightment must be procured on shipment,* and that a bill of lading issued thirteen days after the original shipment at another port in another country was not procured on shipment.

In Landauer & Company v. Craven & Speeding Brothers, (K. B. Div.) 2 Law Reports 94 (1912), the headnote is as follows:

"Sellers agreed to sell 400 bales of hemp at a price to include cost, freight and insurance. By the terms of the contract of sale the hemp was to be shipped from a port in the Philippine Islands or from Hongkong by steamer or steamers direct or indirect to London between October 1 and December 31, 1909; payment was to be by cash in exchange for shipping documents, and disputes under the contract were to be settled by arbitration.

The sellers then purchased from B. & Co. 400 bales of hemp. This hemp had been shipped at Manila, a port in the Philippine Islands, under bills of lading dated at that place December 28, 1909, for delivery at Hongkong to the order of the shippers; it was intended for transshipment and was transshipped on a steamer bound for London, the bills of lading being dated at Hongkong, March 25, 1910; it had been insured by the shippers from Manila to London.

The sellers tendered to the buyers in fulfillment of the contract of sale the bills of lading from Hongkong and the policy of insurance from Manila to London. The buyers paid the contract price under protest contending that these documents were not a good tender under the contract. The dispute was referred to arbitration.

The arbitrator found that it was a usual course,

when goods were shipped from Manila to London, to transship them at Hongkong, but to ship them in the first instance at Manila on a through bill of lading from Manila to London; in so far as it was a question of fact, he found that, on a contract of sale of goods on cost, freight and insurance terms, it was by mercantile usage, unless otherwise agreed, the duty of the seller to provide by contract of affreightment for the carriage of the goods from the port of shipment to the port of destination named in the contract, and by an indorsed bill of lading, or otherwise, to transfer to the buyer the benefit of the rights created by the contract of affreightment between the shipper and the shipowner for the entire voyage from the port of shipment to the port of destination:

HELD, that the tender of the documents was not a good tender under the contract, first, because it did not include a contract of affreightment to London made before December 31, 1909, and, secondly, because it did not include a contract of affreightment from Manila to Hongkong."

The inevitable conclusion from these two cases is that a requirement that shipment should be from Java to Philadelphia imports and requires a contract of affreightment to be procured at the time of shipment from the *terminus a quo* to the *terminus ad quem;* in other words, an initial shipment from Java to Philadelphia.

This was one of the conditions of the contract expressly set out and carefully referred to in both the opening and concluding paragraphs of the letter of credit. In the language of 2 Williston on Sales (2nd Ed.), page 1226, "Whatever conditions are expressly stated in the letter must be strictly observed in order that the beneficiary may enforce a claim against the

Bank." The same author in the same paragraph makes the following observation which is very pertinent in this case:

> "And if the Bank issuing the credit pays without performance of the conditions, it may find itself unable to charge against its customer, the buyer, the money which it has paid."

In anticipation of a discussion of the position of the petitioners, it might be well at this point to observe that so far as the instant case is concerned, there is no difference between a c.i.f. and f.o.b. shipment. It is true that some of the cases relied upon by the respondent involved shipments of the former class, but this is not universally true; in fact in Filley v. Pope the shipment was an f.o.b. shipment, the pig iron having been produced, and at the time of the contract being in Scotland, and the delivery to take place in New Orleans. Yet in this case this Court unanimously held that all contractual requirements preceding the delivery were required to be performed, including the requirement that shipment should be from Glasgow and not from Leith. If there were any justification for a distinction in the present instance between a c.i.f. and a f.o.b. shipment, this decision might have been otherwise and thus sustained petitioner's contention, but such was not the case. The main distinction between the character of the two methods of shipment pertains to the time of the passing of title. In neither case is a defaulting seller permitted to invoke the distinction as a ground for absolution when he has failed to perform some contractual obligation.

Referring to the case of Bowes v. Shand for further

illustration, what possible difference would follow in the decision if the shipment in question were an f.o.b. shipment rather than a c.i.f. shipment, or a c.i.f. shipment rather than an f.o.b. shipment? The requirement was that the rice in question was to be shipped at Madras during the months of March and/or April; a part being shipped in February, it was held that this was not in compliance with the terms of the contract.

A seller who has undertaken to perform certain conditions with reference to the subject-matter of his contract must show when he seeks to enforce the same that he has complied with his obligations. This is true regardless of when title passes.

If the rice in question had been required to be harvested during a certain month, it is immaterial whether the delivery was in Madras or in London. The pig iron was required to be shipped by a certain route specified in the contract, it was therefore essential that that route be followed even though the title to the merchandise did not pass until final destination was reached. And so it follows that if shipment is to be made during a specified time from Java to Philadelphia, that requirement must be complied with before the seller can invoke a liability against the buyer. In Filley v. Pope, the pig iron reached its ultimate destination *via* Leith as soon or perhaps sooner than it would have had it been shipped according to the contractual requirement *via* Glasgow, but this court held that the contract had not been properly complied with. As a consequence, it may be easily conceived that the sugar reached Philadelphia as soon or sooner, by the route it traveled, than it would had there been a direct shipment from Java to Philadelphia, but under the principle of Filley

v. Pope this is no answer to the respondent's position.

Judge Rose, in disposing of the contention made by counsel for the petitioners that in Landauer v. Craven and Speed Bros. (*supra*) the shipment was a c. i. f. shipment, and not a f. o. b. shipment, as a reason why the principle there enunciated was not applicable in the present instance, states (2 Fed. (2) 29):

> "Now it is true, as it is pointed out by the learned counsel for the seller, that the contract here is not a c. i. f. contract, but it is one under which the buyer had an insurable interest, and is therefore one which, so far as this question is concerned, is governed by the same principle. Moreover, at all events, Landauer v. Craven & Speed is one of the many cases which hold that the character of the shipment is fixed at the time it is made, a principle which has received new and recent affirmation by the House of Lords in Hansson v. Hamel & Horley, L. R. 1922, 2 App. Cases 36."

E. CASES RELIED ON BY PETITIONERS.

The cases principally relied upon by the petitioners are those in lower courts in which the facts were more or less similar to those in the present case, in which the petitioners' contention is apparently sustained. None of these cases are in any sense a controlling authority, and they should not commend themselves to the favorable consideration of this Court for various reasons.

It will be at once apparent that there is neither citation of authority nor logical reasoning which justifies the conclusion reached, and it will also be apparent that the principles which are therein casually assumed and which are in conflict with the contention of the respondent, are directly in opposition to the principles

laid down by this Court in the cases hereinabove cited, and which, if applicable, should be controlling.

A consideration in detail of the cases in question we believe will justify the above statement.

Wilbur v. Lamborn, 276 Pa. 479.

The facts in that case were identical with those in the present, and the decision of the Court is contrary to our contention. It is, however, based upon premises that are likewise contrary to the holding of this Court in Filley v. Pope, *supra;* Norrington v. Wright, *supra,* as well as other cases hereinbefore cited. A comparison of the language in the Wilbur case with that of this Court in analogous cases will fully sustain our contention.

In the Wilbur case the Supreme Court of Pennsylvania cites with approval the following language of the trial judge:

> "The subject-matter of this contract is the sale of sugar. That is the material thing in it, and that part of the contract which provides for delivery in a certain way, being transported by a vessel, is an incident of that sale and delivery; and, unless somebody was harmed by reason of the manner in which delivery was made, that part ought to give way to the common intent of the contract which is the sale of sugar and its delivery."

And the same Court proceeds:

> "Some point is made by appellant of the fact that the West Cheswald was originally bound for New York and diverted to Philadelphia. We think this diversion was of no consequence under the

contract. Plaintiff was concerned only with the delivery of the merchandise,—that there should be no delay in its arrival."

Compare the foregoing utterance with the language of Mr. Justice Gray in Filley v. Pope:

"The thing sold, and described in the contract, is '500 tons No. 1 Shott's (Scotch) pig iron,' to be shipped 'from Glasgow as soon as possible.' It is not merely 500 tons of iron of a certain quality; nor is it such iron to be shipped as soon as possible from any Scotch port or ports; but it is iron of that quality to be shipped from the particular Port of Glasgow as soon as possible. The court has neither the means nor the right to determine why the parties in their contract specified 'Shipment from Glasgow,' instead of using the more general phrase 'shipment from Scotland,' or merely 'shipment,' without naming any place; but is bound to give effect to the terms which the parties have chosen for themselves. The term 'shipment from Glasgow' defines an act to be done by the sellers at the outset, and a condition precedent to any liability of the buyer. The sellers do not undertake to obtain shipment, nor does the buyer agree to accept iron shipped, at any other port. The buyer takes the risk of delay in getting shipment from Glasgow, or of delay or disaster in prosecuting the voyage from Glasgow to New Orleans. But he does not take the risk of delay or of sea perils which may occur in the course of the different voyage from Leith to the same destination.

One or two illustrations may help to make this clear. If the sellers had shipped the iron by the first opportunity from Glasgow, the buyer could not have refused to accept it, even if it could have been shipped sooner from Leith. Again: the buyer would have an insurable interest in the iron dur-

ing the voyage, by reason of the title which would accrue to him under the contract on arrival and delivery, and of the profits that he might make in case of a rise in the market. * * * But a policy of insurance upon the iron for a voyage from Glasgow would not cover a voyage from Leith."

And also compare the same with the language of the Lord Chancellor in Bowes v. Shand, set out at length and approved in Norrington v. Wright:

> "What is sold is not 300 tons of rice in gross or in general. It is 300 tons of Madras rice to be put on board at Madras during the particular months. The plaintiff, who sues upon that contract, has not launched his case until he has shown that he has tendered that thing which has been contracted for, and if he is unable to show that, he cannot claim any damages for the non-fulfillment of the contract."

And also the language of Lord Blackburn in the same case:

> "If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties bargained for was rice, shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras. I do not quite know what the boundary is, and probably equally good rice might have been shipped in February as was shipped in March, or equally as good rice might have been shipped in May as was shipped in April, and I dare say equally good rice might have been put on board another ship as that which was put on board the Rajah of Cochin. But the parties have chosen, for reasons best known to themselves,

> to say: We bargain to take rice shipped in this particular region, at that particular time, on board that particular ship; and before the defendants can be compelled to take anything in fulfillment of that contract it must be shown not merely that it is equally good, but that it is the same article as they have bargained for; otherwise they are not bound to take it. 2 App. Cas. 480, 481."

In the light of the unmistakable language of this Court and of the opinions rendered in the House of Lords in Bowes v. Shand, adopted by this Court, can any reliance be placed upon the decision in the Wilbur case in disposing of the question now before this Court?

> Matthew Smith Tea, Coffee & Grocery Company v. Lamborn & Company, 276 Fed. 325.

This case was apparently decided upon substantially the same facts as obtained in the present case, but as will be seen from an inspection of the opinion there was no discussion of the point here involved. Judge Hand's opinion seems to have been an oral one, which did not go to the full merits of the case, but simply upon an interlocutory motion. He seems to assume that the shipment on the WEST CHESWALD met the requirements of the contract, and, consequently, the opinion is not helpful in disposing of the phase of the matter which was assumed by the trial judge as well as counsel.

Judge Hand, in stating the facts, uses the following language:

> "* * * the shipment on the West Cheswald met the requirements and specifications of the contract."

This is exactly what we believe the cases decided by this Court indicate that it did not do. Consequently a casual assumption of a fact will not be controlling when the overwhelming authority shows such assumption to be erroneous. We, therefore, earnestly contend that this opinion should have no controlling influence in the present case.

An appeal was taken from the decision of Judge Hand, to the Circuit Court of Appeals for the Second Circuit, and was there heard in conjunction with two other similar cases, these three cases being the same mentioned on page 2 of the petition for writ of certiorari, filed herein, as follows:

> Matthew Smith Tea, Coffee & Grocery Company v. Lamborn & Company.
> Pennsylvania Milk Products Company v. Lamborn & Company.
> L. Brenner Sons and Perloff v. Lamborn & Company, being reported in 10 Fed. (2) 697.

The opinion by Judge Hough on appeal adds but little to the discussion of the subject. While the language under consideration was contained in a sales contract and not in a letter of credit, the opinion seeks to distinguish between the case under discussion and Judge Rose's opinion in the instant case, concluding that it is not required to express assent or disagreement with the opinion of Judge Rose. On the main question involved, it has only this to say:

> "On the other question, the single issue arising on the pleading, we are of opinion that Lamborn had good right to tender sugar *Ex.* West Cheswald, and have little to add to the opinion of Hand, J. in 276 F. 325."

In this regard the opinion is similar to that in Wilbur v. Lamborn and that of Judge Hand in the trial Court, in that it assumes rather than demonstrates the conclusion arrived at. This point is perceived and commented upon in the exhaustive opinion of Judge Rose rendered in the Circuit Court of Appeals, 2 Fed. (2) 23, when he says:

> "In the jurisdictions other than this, each of the Courts apparently felt that the answer it gave was so obviously correct as to require the support neither of discussion nor of authority."

The petitioners are particularly unfortunate in citing Harrison v. Fortlage, 161 U. S. 57, in an effort to sustain their contention:

The subject of the contract in that case was

> "About 2500 tons superior Iloilo sugars, usual assortment (1/8 No. 1, ¼ No. 2 and 5/8 No. 3) shipping or to be shipped during this month from the Philippines to Philadelphia, per Steamer 'Empress of India.' "

The contract was strictly complied with so far as the terms relating to shipment were concerned. As said by Justice Gray:

> "The sugar was shipped at the Philippine Islands in bags, in the amount, quality, and assortment, and within the time, specified in the contract, on the 'Steamer Empress of India,' which was then seaworthy and fit in every particular for her voyage *and which sailed for Philadelphia.*" (Italics ours.)

It will be observed that the shipping requirements of the contract under consideration and those set out

in the letter of credit in the instant case were practically identical. In Harrison v. Fortlage the shipping requirements were complied with to the letter. In other words, the sugar was shipped within the time specified in the contract, on the steamer specified therein, and which *sailed at the time of her departure from the Philippines to Philadelphia;* in every particular a strict compliance with the terms of the contract. In the present case the sugar in question left Java on a vessel which, so far as the documents show, was never intended for Philadelphia, and which was only conditionally intended for the United States at all, her original destination being Port Said, with an option, which might or might not have been exercised, to extend the voyage to New York, but not to Philadelphia.

As was again said in the opinion:

> "The sugar in question having been put on board the 'Empress of India' and *the conditions of the contract thus satisfied,* so far as that ship was concerned, the subsequent transportation and delivery of the goods were to be governed by the general rules of the maritime law." (Italics ours.)

Can it by any possibility be claimed that, had the shipment in Harrison v. Fortlage been on a vessel destined for Port Said, with an option to New York, it would have been a compliance with the terms of the contract, providing for a shipment from the Philippines to Philadelphia? The answer must necessarily be in the negative.

It seems to be the theory of petitioners, which theory

seems to have been adopted by the trial judge on the first trial, that arrival at Philadelphia is the sole desideratum. Judge Groner, in his opinion in construing the requirements of the contract as to shipment, says: (R. 51)

> "I can't imagine that the contract contemplates or requires that there must have been all the time, from the inception of the voyage, the intent and purpose to send the vessel to Philadelphia. If the intention occurred and was consummated by the act itself any time after the voyage commenced, it seems to me that it would be a compliance with the contract."

If this is the case why the elaborate provisions of the letter of credit:

> "Shipment to be made during August, September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia?" (R. 8)

That the letter of credit did contemplate and require that there must be all the time from the inception of the voyage the intent and purpose to send the vessel to Philadelphia is shown by the requirement that among the documents to be furnished was "copy of ocean bill of lading covering shipment Java to Philadelphia," (R. 8). This bill of lading is necessarily issued in Java prior to the inception of the voyage. The bill of lading issued by the *West Cheswald* prior to her leaving Java could not have complied with this requirement, because by its terms it described the destination of the shipment as "Port Said, option New York." (R. 116) This requirement could only have been complied with by a bill of lading showing

shipment from Java to Philadelphia, and thereby describing and providing for a shipment with these termini then and there in contemplation.

It is true, as mentioned before, that the requirement as to furnishing a copy of the bill of lading at the time of the presentation of the draft was dispensed with, yet neither the character of shipment nor the essential ocean bill of lading to be issued at the time of shipment was ever dispensed with, and, as a consequence, the requirement that the shipment be one from Java to Philadelphia was necessarily maintained at all times.

The petitioners themselves recognize the casual character of the *West Cheswald's* voyage. They say on page 39 of their brief, in speaking of this vessel:

> "She was destined for no particular port but could go to any one."

How could the cargo of such a vessel, destined for no particular port, be considered a shipment with a definite ultimate destination?

Justice Gray's opinion in Harrison v. Fortlage has construed the meaning of similar language in a manner consistent with the contention of the respondent. The position of petitioners and the theory of the trial judge's opinion is directly to the contrary. Is it not an effort to do what Mr. Justice Gray says in his opinion cannot be done, namely:

> "The Court is not at liberty either to disregard words used by the parties descriptive of the subject matter, or of any material incident, or to insert words which the parties have not made use of."

There are cited for this proposition many of the cases which are relied on by the respondent in this brief.

It will be seen that the cases relied on by petitioners and which are more nearly in point are *nisi prius* decisions, with the exception of the Pennsylvania case of Wilbur & Sons, Incorporated, v. Lamborn, 276 Pa. 479, and Matthew Smith Tea, Coffee & Grocery Co. v. Lamborn (3 cases) 10 F. (2d) 697, which are heretofore discussed. We believe it has been shown that those cases, as well as the others relied on by petitioners, are decided directly contrary to the principles laid down on Norrington v. Wright, 115 U. S. 188, and Filley v. Pope, 115 U. S. 213. These two cases have been often considered and applied and especially have they received spontaneous recognition and approval by the Circuit Court of Appeals of the Fourth Circuit in analogous cases.

In Lamborn & Company v. Palmetto Grocery Company, 284 Fed. 431, in a unanimous opinion rendered by Judge Groner, (Circuit Judges Knapp and Waddill also sitting) citing Norrington v. Wright, it is said:

> "It has been repeatedly held that a statement in a mercantile contract descriptive of some material incident is a condition precedent to the enforcement of the contract, and that courts have neither the means nor the right to determine why parties, in their contract, specified the method of handling the subject matter as they did, nor to substitute some other method, equally as good, for that agreed upon."

In Markey v. Brunson, 286 Fed. 896, in a unanimous opinion by Circuit Judge Woods, (Circuit Judges

Waddill and Rose also sitting) citing Norrington v. Wright, it is said:

> "The instructions were correct that compliance by the seller of his undertaking as to the time of shipment was necessary to charge defendant, and that defendant was under no obligation to receive goods shipped after the expiration of the time. 'In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law; that is to say, a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract.' "

In The Manhattan, 284 Fed. 313, in the opinion by Judge Waddill, citing Filley v. Pope, it is said:

> "Secondly, that the purchaser had no right to insist upon shipment being made exclusively on the Manhattan. This contention is equally without merit. The contract was for shipment on that vessel at a specified time, refusal of substitution of another vessel by the respondent being denied positively, and upon the consummation of the contract to ship on the Manhattan the purchaser was entirely within its rights in so insisting. This principle is well recognized in maritime contracts. The reasons therefor are manifest, and the right free from debt."

It will thus be seen that the principle for which respondent contends is not a new or novel one, but has

been long recognized as the rule laid down by this Court and followed consistently and repeatedly by it, as well as by the lower Federal Courts, including every member of the Circuit Court of Appeals for the Fourth Circuit, as well as by Judge Groner, the trial judge.

An effort has been made by the petitioners to invoke either the rule as laid down by the Supreme Court of Pennsylvania in Wilbur & Sons, Inc. v. Lamborn, 276 Penn. 479, on the ground that delivery of the sugar in question was to be made in Philadelphia, Pennsylvania, and consequently that the law of Pennsylvania should control, or failing in this, that as the letter of credit was payable in New York, the decision of the Circuit Court of Appeals for the Second Circuit, rendered in Matthew Smith Tea, Coffee and Grocery Company v. Lamborn, 10 Fed. (2) 697, announcing the law of New York should control. Both of these positions are without merit. Under certain circumstances it is conceivable that the law of the place of performance might assume a very important aspect, but not in the present instance. The decision in 10 Fed. (2) 697, is one pertaining to general law and has no reference to any local statutes or customs. Nor does it possess any other elements of a controlling character. It is anticipated that the decision of the Circuit Court of Appeals for the Second Circuit will be given such consideration and only such consideration as it is inherently entitled to. It will be observed that there are no cases cited by petitioners from the court of last resort in the State of New York. It is true that they have referred to certain decisions of the Supreme Court of that state, but it is needless to say that this Court even in its Appellate Division is only an inter-

mediate court. The only cases decided by the Court of Appeals of New York, the highest Appellate Court of that State, and relied on by either party to this litigation are those heretofore found in this brief, namely:

Bank of Montreal v. Recknagel, 109 N. Y. 482.
Ledon v. Havemeyer, 121 N. Y. 179.
Iasige v. Rosenstein, 141 N. Y. 414.
Firemen Insurance Company v. Lawrence, 14 Johnson (N. Y.) 56.

All of these cases we believe to be in point and are confidently relied upon in sustaining our contention consistent with our previous observation. It is felt, however, that even these decisions are not controlling upon this Court but at most are only persuasive.

The matter here involved is one of general commercial law possessing no local attributes. The parties in interest are citizens of different states. The occasion for the letter of credit was a commercial contract pertaining to a subject matter then located in the Orient. The instrument upon which suit was brought was a letter of credit possessing all of the attributes of a negotiable instrument. It therefore necessarily follows that State decisions have no controlling effect in a case of this kind and that this Court will follow its own independent opinion.

It hardly needs the citation of authority for the proposition that the Judiciary Act, which by repated reenactments is still the existing law, in declaring local laws rules of decision in Federal Courts, is limited in its application to laws strictly local, and construction thereof adopted by local tribunals and to rights and titles to things having permanent locality; it does not extend to contracts and other instruments of a

commercial nature. Swift v. Tyson, 16 Peters, 1. This principle has received such general recognition and has been so consistently followed that a citation of all of the many cases on the subject decided by this Court would be superfluous. Among the analogous instances in which this Court has exercised its independent judgment have been the following:

In the matter of negotiable instruments:

> Brooklyn City and Newtown R. R. Co. v. National Bank, 102 U. S. 14.

In the matter of the construction of insurance contracts:

> Carpenter v. Providence Washington Insurance Company, 16 Peters, 495.

In the matter of the liability of common carriers:

> Chicago, etc. Ry. Co. v. Ross, 112 U. S. 377.

In the matter of the validity of stipulations in Bills of Lading:

> New York Central R. R. Co. v. Lockwood, 17 Wall. 357.

It would therefore seem to conclusively follow that this Court treating the question involved as one of general commercial law will proceed to consider and dispose of the same, forming its independent judgment, untrammeled by the decision of any State court, giving, however, to all pertinent decisions such persuasive consideration as they may be justly entitled to.

F. Judge Rose's Opinion.

Most of the cases herein cited, as well as those contained in the petition and brief of the petitioners for a writ of certiorari were used in the various arguments in the lower courts, and it would seem in order at this point to briefly refer to the opinion rendered by Judge Rose on the first appeal, this being reported in 2 Fed. (2) 23. Judge Rose's opinion differs from those rendered in Wilbur v. Lamborn, 276 Pa. 479 and in Matthew Smith Tea, Coffee and Grocery Co. v. Lamborn, 10 Fed. (2) 697, not only in the conclusion arrived at, but also in the elaborate discussion of the authorities justifying that conclusion.

As Judge Rose aptly observes in the course of his opinion:

> "In the jurisdictions other than this, each of the Courts apparently felt that the answer it gave was so obviously correct as to require the support neither of discussion nor of authority."

Judge Rose's opinion, whatever else may be said of it, is not subject to this comment. He takes up in detail all of the cases relied upon by the petitioners to sustain their contention and reasoning from the decisions of this Court as well as from those of the House of Lords and the inferior English Courts demonstrates conclusively the correctness of his position and the inherent incorrectness of the contrary opinions. He concludes his opinion with the following language:

> "We in the past have had more than one occasion to hold that in mercantile contracts the Courts must give effect to every term in the bargain the parties have chosen to make and are not

at liberty to speculate whether they did or did not attach importance to something they wrote. As for example in The Manhattan 284 Fed. 310, we accepted as settled law that a purchaser of grain to be shipped by one ship could not be required to take it if it came in another and that we could not inquire whether every possible purpose of the buyer would not be as well served by that which was brought in the substitute. From much which was said by the tribunals which have heretofore passed upon the obligation of buyers to accept sugar from the *West Cheswald,* it would seem that it is at least possible that their conclusions were influenced not a little by their natural desire to prevent on a rapidly falling market purchasers from escaping from a bad bargain by taking advantage of a variation from the terms for which they in fact cared nothing. Such considerations have much less weight in construing and enforcing the agreements of business men than the Courts may properly give to them when they are called upon to deal with contracts of a less strictly mercantile character. In this respect we can add nothing to what has been so forcibly said in the quotations made from Mr. Justice Gray in this country and from Lords Cairns and Blackburn in England. Our examinations of the cases which in this country and across the water have put a definite interpretation on the meaning of the word 'shipment' as used in contracts of the character of that with which we are here concerned, has convinced us that the instant case is not distinguishable from it and is governed by what the Supreme Court there said."

V. THE DOCUMENTS FAIL TO SHOW TENDER OF JAVA WHITE SUGAR.

The letter of credit covers one thousand (1,000) bags Java White Sugars at twenty-two cents per pound.

It is naturally to be presumed that from the inclusion of the term "white" there were other Java sugars of a different quality and value.

There were three documents required to be tendered at the time the payment of the letter of credit was requested:

(a) Sight draft. A copy of this is found in the printed Record (R. 40). This is in the usual form and refers to the letter of credit in question, no reference being made on its face to sugar at all.

(b) The invoice, which is simply a bill made out by Lamborn & Company, and which shows on its face that it is for 1000 bags of Java White Sugar (R. 42).

(c) Order Notify Bills of Lading. These are found among the photostatic copies of the original papers which were certified up to the Circuit Court of Appeals under stipulation and show that they were issued simply for 1000 bags Java sugar, being described as follows:

Car CRI&P	40979	335 Bags wg. 75420 lbs. gross
MSPSM	36470	335 Bags wg. 75620 lbs. gross
TNO	31041	330 Bags wg. 74240 lbs. gross

In addition to these requirements there was also furnished the sworn certificate of Geo. J. Hoffman & Company, Weighers, showing the result of the weighing of "1000 Bags Sugar." (R. 43).

It will thus be seen that with the exception of the invoice which was made out by Lamborn & Company, the parties most interested, and which was entirely self-serving, there was nothing in any of the documents tendered to show that the sugar against which the draft in question was drawn was Java White Sugar, as required by the letter of credit, and the Bank

was certainly not called upon to assume the risk that it was such, in the light of the independent documents thus presented.

This question has come before the Courts on a number of occasions and the principle for which we contend recognized and enforced.

International Banking Corporation v. Irving National Bank, 274 Fed. 122.

It was there held that where the letter of credit issued by a bank required the draft to be accompanied by commercial documents showing that the silk was to conform to a certain design and the stripe was not to exceed 50 per cent of the width of the material, the omission from the documents presented of the required statement concerning the width of the stripe justified the Bank's refusal to pay the draft, since it cannot be required to determine whether such omission has any commercial significance, nor to construe the documents, nor decide arguable questions.

Judge Mayer, in the course of his opinion, says:

> "It would gravely impair the business of issuing letters of credit, if banks were required to construe the documents involved and determine arguable questions. * * *
>
> "The only safe rule for a bank is to refuse to pay, if, by omitting, as here, a distinct and clearly expressed provision, the documents do not conform with the letter of credit."

This case was affirmed on appeal.

> International Banking Corporation v. Irving National Bank, 283 Fed. 103.

Lamborn v. Lake Shore Banking Company, 188 N. Y. Sup. 162.

In this case a quantity of sugar was sold by Lamborn to the Ohio Confection Company of Cleveland, and by the terms of the sale a letter of credit on the Royal Bank of Canada, in New York, was to be issued by the Lake Shore Banking and Trust Company of Cleveland. The letter authorized the payment of $26,-561.92 against bills of lading for "550 bags of Java White Granulated Sugar." The Court said:

> "Under the terms of the letter of credit this draft could only be drawn against the bill of lading for Java white granulated sugar. The bill of lading attached to this draft, therefore, did not comply with the terms of the letter of credit, inasmuch as the sugar described therein was simply 'Java white sugar.' Affidavits are presented on the part of the plaintiff which tend to show that Java white granulated sugar was not only known in the market as Java white sugar, but was the only white sugar shipped from Java. These affidavits are to an extent contradicted upon this points by the affidavits of the defendant. But with this fact the defendant is not concerned. It is clear that the defendant is not under obligation to investigate and ascertain whether the contract between the vendor and vendee has been fulfilled. The only contract which the defendant has made was to honor the vendor's drafts as against the bill of lading for 'Java white granulated sugar.' "

The plaintiff's in the trial court relied upon *Border National Bank v. American National Bank,* 282 Fed. 73. This was a case involving a shipment of sugar under a letter of credit with the usual documents and in which the sugar was correctly described in the bill of lading, but not described in any other document.

This is not the case in the present instance. While

it is true that the invoice, which was prepared by the plaintiffs, contains a description conforming to the letter of credit, this description is not contained in the other documents in the case issued by the independent third parties, in which the merchandise is simply described as "Java Sugar," of which it is well known there are many varieties and grades.

We earnestly contend that it was not incumbent upon the defendant to take the risk that the sugar described in the railroad bill of lading and the official weigher's receipt was of the same character as provided for in the letter of credit, in the absence of any evidence other than the self-serving declaration of the plaintiffs that such was the case.

As very properly stated by Judge Mayer in *International Banking Company v. Irving National Bank* (*supra*), the Bank is not required to construe the documents involved and determine arguable questions, but that the only safe rule is for the Bank to refuse to pay if the documents do not conform to the letter of credit.

VI. THE TRIAL COURT PROPERLY REFUSED TO PERMIT THE PETITIONERS TO RAISE THE QUESTION OF ALLEGED CUSTOM IN CONNECTION WITH THE MEANING OF THE WORD "SHIPMENT."

In view of the comprehensive scope assumed at the first trial in which all available evidence was produced, it necessarily followed that the second trial should have been little more than a formality to comply with the requirements of Federal procedure, but resourceful counsel, realizing their situation, made in their extremity a belated but ineffectual effort to give a differ-

ent complexion to the second trial by amending their notice of motion for judgment by the addition of the following allegations:

"That by the words in said letter of credit dated May 11, 1920, 'F. O. B. cars Philadelphia, Pa., landed weights, shipment to be made during August-September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia, Pa.' the parties—you and the undersigned—herein meant and intended, and you understood that the said 1,000 bags of sugar were to be laden on board a steamer or steamers at or in a port or ports of the Island of Java on any day or days in the months of August and/or September, 1920, and thereafter to be carried by such steamer or steamers to Philadelphia, Pa., and that delivery to T. S. Southgate & Co., was to be made by placing the said 1,000 bags free on board railroad cars at Philadelphia, and that the title and property right in said goods remained in Lamborn & Company, the undersigned, until said delivery at Philadelphia to T. S. Southgate & Co. That at all the times herein mentioned there existed a well known, long established and generally recognized custom among importers and buyers and sellers of imported sugars wherein and whereby the expression: 'F. O. B. cars Philadelphia, Pa., landed weights, shipment to be made during August-September, 1920, at option of the sellers from Java by steamer or steamers to Philadelphia, Pa.,' meant and intended, and was understood as meaning and intending that the sugar sold was to be laden on board a steamer or steamers at or in a port or ports of the island of Java on any day or days in the months of August and/or September, 1920, and thereafter to be carried by such steamer or steamers to Philadelphia, Pa., and that delivery to the purchasers was to be made by plac-

> ing the sugar free on board railroad cars at Philadelphia, Pa., and that the title and property right remained in the sellers until said delivery to the buyers at Philadelphia, Pa.; and that said words did not mean nor require that the vessel or the goods carried thereon be at the time of shipment destined for Philadelphia, Pa."

This effort evinces enterprise and ingenuity rather than an appreciation of sound legal principles.

The Circuit Court of Appeals in its first opinion concluded its discussion of the point involved with this significant language:

> "Our examination of the cases which in this country and across the water have put a definite interpretation on the meaning of the word 'shipment' as used in contracts of the character of that with which we are here concerned, has convinced us that the instant case is not distinguishable from them and is governed by what the Supreme Court there said." 2 Fed. (2) 29.

This language can have but one meaning, and that is, that at the time the letter of credit in question was issued, the general law on this subject as recognized and declared by the highest Courts not only of this country, but of England, was in accordance with the contention of the respondent, namely, that the requirement as to shipment imposed upon Lamborn & Company the obligation of tendering sugar under the contract, which had been shipped during the months of August-September, 1920, from Java in a ship or ships then and there destined for Philadelphia, Pa.

The obvious effect of the amendment which the petitioners attempted to make to their original notice of motion was to vary and contradict the general law in

existence at the time when the contract in question was made, and which had been theretofore recognized and upheld by the Supreme Court of the United States.

It is not necessary to discuss at this point the general subject of amendments to pleadings after a hearing in an Appellate Court. The policy in this regard is liberal, but we have been unable to find any authority permitting an allegation or amendment at any stage of the case when the obvious effect of the allegation or amendment is to contravene a well established principle of law.

This basic principle is as applicable to an original allegation as it is to an amendment. In other words, if the original notice of motion had alleged a custom or undertanding which was contrary to law, it would have been demurrable, and so by the same token, when an amendment is interposed setting up an illegal custom or understanding it should likewise be rejected, not because it is an amendment, but because it attempts to set up a custom or understanding in defiance of law.

To permit those engaged in the Java sugar trade to contravene the decisions of the Supreme Court of the United States by setting up a contrary custom or intention would vest legislative power in private citizens, which would be contrary to public policy.

In *Conn. Fire Insurance Company v. Buchanan,* 141 Fed., at page 884, Mr. Justice Van Devanter, then Circuit Judge, quoted with approval from the opinion in *Glendale Woolen Company vs. Protection Insurance Company,* 21 Conn. 19, as follows:

> "If we have the precise contract which the parties chose to make for themselves, and there be no

> imperfection or ambiguity in the language used to express the meaning of the parties, clearly we have no right to depart from the language, and travel out of the contract, to see if the parties did not, after all, mean something different from what is written. Why, we ask, resort to inferior and secondary evidence, such as inferences from supposed usages or circumstances, or the knowledge or the talk of the parties, at the time of entering into the contract? * * * The rule is well established that when the parties have deliberately put their engagements into writing in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking was reduced to writing. After this, to permit oral testimony, or prior or contemporaneous conversation, or circumstances, or usages, etc., in order to learn what was intended or to contradict what is written, would be dangerous and unjust in the extreme."

The Circuit Court of Appeals had decided in this case what the parties meant by the language they used, and it followed that it was not permissible to vary the same by the claim of an existing usage or custom to the contrary.

The same principle was recognized by Mr. Justice Sanford, then District Judge, in *Dibert v. Wernicke*, 214 Fed. 682, when he said:

> "And the fact that such sale in respect to the withholding of information as to the pledged property appears to have been conducted in accordance with the custom of the New Orleans Stock Exchange, is not sufficient to render the sale valid; such custom, when applied to a sale made by a pledgee, being in conflict with the rule of law as to

> the measure of care and diligence imposed upon a trustee in selling pledged property, especially when he himself becomes the purchaser."

In *First National Bank of Cincinnati v. Burkhardt*, 100 U. S. 686, Mr. Justice Swayne clearly states the rule as follows:

> "A general usage may be proved in proper cases, to remove ambiguities and uncertainties in a contract, or to annex incidents, but it cannot destroy, contradict or modify what is otherwise manifest. Where the intent and meaning of the parties are clear, evidence of a usage to the contrary is irrelavant and unavailing.
>
> "Usage cannot make a contract where there is none, nor prevent the effect of the settled rules of law."

A general usage may be proved in proper cases to remove ambiguities and uncertainties in a contract, but we have seen no cases, nor do we believe there can be, in which a usage has been permitted to contravene a settled rule of law. The mere statement of this proposition is its strongest refutation. The consequence would be that individuals could defy the courts with impunity, and by agreement or custom establish a drastic and selfish rule contrary to law and equity as declared by the highest courts of the country. In this case it would mean that Lamborn & Company, experienced traders in Java sugar, could invoke a rule against the respondent contrary to that declared by the Supreme Court of the United States.

It may also be in order to observe at this point that the evidence of custom which the petitioners sought to introduce did not pertain to any custom affecting

letters of credit, but had special reference only to customs affecting shipping and marine insurance. Were this class of evidence otherwise unobjectionable, which, for the reasons hereinbefore stated, we are in no sense prepared to concede, it would have been objectionable on the ground that it did not relate to letters of credit at all, but to alleged customs involving other relationships. This distinction is recognized by Circuit Judge Mayer in rendering the unanimous opinion of the Circuit Court of Appeals for the Second Circuit in Old Colony Trust Company v. Lawyers Title and Trust Company, 297 Fed. 157, where he says:

> "Assuming the existence of this custom, it will be noted that it relates to a custom between buyer and seller, and, in any event, is somewhat dependent upon the contract between them. It is not a custom in respect of letters of credit where to repeat, we must always return to the language."

In disposing of this phase of this matter, Judge Rose in his opinion rendered on the second appeal (15 Fed. (2) 473), says:

> "After the case was remanded to the District Court the plaintiffs asked leave to amend their motion for judgment, a pleading which, under the modern Virginia practice, may take the place of a declaration at common law. They wished to insert in it a properly phrased allegation that there was in the trade in imported sugars a custom by which a provision that sugar should be shipped from a foreign port to one seacoast city in this country was understood to permit the doing of what the plaintiffs did. In the exercise of his discretion the learned District Judge refused to permit the amendment to be made. In so doing he said among other things:

'The Circuit Court of Appeals in this case in a very elaborate opinion has decided the meaning of the precise language in the contract that is now sought to be construed differently by virtue of proof of custom or intent. The effect of allowing an amendment of this kind at this time would be, if it were sustained by proper evidence to have a case in which the Circuit Court of Appeals had construed a contract of sale, in which they found no ambiguity, no difficulty in determining the precise and exact meaning of the parties and had finally concluded what the parties themselves meant and intended by the contract and having that determination before me, to find that it meant something entirely different, that its language was not plain and unambiguous, that there was something about it so obscure that it required the introduction of evidence of a custom to determine what it did mean and finally determining that it meant something different from what the Circuit Court of Appeals had decided, would be a thoroughly anomalous condition of affairs. Hence it seems to me that to allow this amendment to be made now would be a purely idle thing, a useless thing since in the very nature of things when the evidence to support it came to be introduced an objection would be made on the ground of its inadmissability because the instrument speaks for itself, does not require the aid of custom to interpret it, and would therefore have to be overruled and refused admission on that account.'

"We see no occasion to add anything to this clear statement which is also a complete answer to such of the assignments of error as are directed to the exclusion of the subsequently offered testimony as to the custom in question."

We therefore feel that the action of the Trial Court in striking out the amendment and also in rejecting the depositions in which the custom was attempted to be set up was eminently proper.

VII. CONCLUSION.

We deem it only fair to the Court, as well as to the respondent, that the latter's position in this matter should be understood. Attention is therefore called to the testimony of Mr. Wharton, the Cashier of the National Bank of Commerce, the respondent, (R. 65). He states:

> "The draft drawn against the letter of credit was not paid because our information was that the terms of the credit had not been complied with.
>
> "Q. Why did you decline to pay it? A. You want me to elaborate?
>
> "Q. Tell your reason in full to the jury. A. We had information that the ship on which the sugar was tendered had been cleared from a port in Java to Port Said with option of New York, and at the last moment a diversion had been made in the ocean for Philadelphia. We understood our terms of the credit were that the shipment was to be from Java to Philadelphia, and that was our reason for not paying.
>
> "We afterwards ascertained that our information on the subject was correct and acting on that information we declined payment. We were at all times ready and able and willing to pay that letter of credit in accordance with its terms and had no other interest in this matter except to live up to the letter of credit."

It will thus be seen that the Bank had no interest in this matter, except to live up to the letter of credit, and if it be true that the conditions of that letter of credit were not complied with, it was not only its right but its duty to refuse payment. Anything short of this would have been a gross breach of faith and would

have prevented its recovery over from Southgate and Company of any amount so paid.

For the reasons above given, we feel that the decision and judgment of the Circuit Court of Appeals for the Fourth Circuit in the case at bar are manifestly right and should be affirmed.

Respectfully submitted,

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